STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL MCGEE, Plaintiff-Appellant,	UNPUBLISHED July 30, 2002
v	No. 225819 Wayne Circuit Court
CITY OF DETROIT, Defendant-Appellee.	LC No. 98-809709-NF

MICHAEL MCGEE, Plaintiff-Appellee,	
v	No. 225824 Wayne Circuit Court
CITY OF DETROIT, Defendant-Appellant.	LC No. 98-809709-NF

Before: White, P.J., and Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

This consolidated appeal stems from a work-related injury suffered by plaintiff while he was working for defendant as a bus driver. In Docket No. 225819, plaintiff appeals as of right, challenging the trial court's determination that he is not entitled to additional work-loss benefits under MCL 500.3107(1)(b), and also challenging the trial court's refusal to award twelve percent judgment interest pursuant to MCL 600.6013(5). In Docket No. 225824, defendant cross-appeals, challenging the trial court's denial of its request for mediation sanctions.[1] We reverse and remand.

[1] MCR 2.403, as amended, effective August 1, 2000, changed the terminology of the rule. "Mediation" is now referred to as "case evaluation." We use the terminology applicable at the time of the proceedings in this case.

In February 1996, plaintiff began working for defendant as a bus driver. In January 1997, plaintiff suffered an injury to his wrist while on the job. Plaintiff's physician indicated that as a result of this injury, plaintiff could no longer work as a bus or truck driver. Plaintiff sought worker's compensation benefits and a right to receive personal protection insurance (PPI) benefits.[2] One year after his injury, plaintiff began training for a new position with defendant. In February 1998, plaintiff returned to light-duty, favored work[3] for defendant, at the same wage he was earning as a bus driver. On February 23, 1998, plaintiff was required to submit to drug testing. Plaintiff tested positive for a controlled substance and was suspended and ultimately fired by defendant.

Plaintiff subsequently brought this action to collect benefits under Michigan's No Fault Act, MCL 500.3101 *et seq.* In addition to other benefits, plaintiff sought work-loss benefits under MCL 500.3107(1)(b), which provides, in part, that PPI benefits are available for "[w]ork loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured."[4] Just prior to trial, plaintiff moved in limine to exclude any and all references to his termination and the results of his drug test. Defendant moved in limine, arguing that plaintiff was not entitled to benefits after the date of his termination in February 1998. The trial court agreed with defendant, and the matter proceeded to trial in connection with other benefits allegedly owed by defendant to plaintiff under the no-fault act. The jury awarded plaintiff a total of $8,498.88 in allowable expenses. The parties stipulated work-loss benefits of $4,606.56. The trial court denied plaintiff's request for twelve percent interest on the judgment.

Plaintiff first argues that the trial court erred in determining that he was not entitled to work-loss benefits for the period of time after his termination. We disagree. Plaintiff argues that regardless of the fact that he was terminated from his favored work, had he not been injured he

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[2] Plaintiff was awarded workers' compensation benefits in a separate proceeding. They are not in issue in this appeal.

[3] "Favored work entails the modification of an employee's duties that in some manner accommodates the employee's injury." *Michaels v Morton Salt Co*, 450 Mich 479, 487; 538 NW2d 11 (1995).

[4] The full text of MCL 500.3107(1)(b) provides:

Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. Work loss does not include any loss after the date on which the injured person dies. Because the benefits received from personal protection insurance for loss of income are not taxable income, the benefits payable for such loss of income shall be reduced 15% unless the claimant presents to the insurer in support of his or her claim reasonable proof of a lower value of the income tax advantage in his or her case, in which case the lower value shall apply. Beginning March 30, 1973, the benefits payable for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period together shall not exceed $1,000.00, which maximum shall apply pro rata to any lesser period of work loss. Beginning October 1, 1974, the maximum shall be adjusted annually to reflect changes in the cost of living under rules prescribed by the commissioner but any change in the maximum shall apply only to benefits arising out of accidents occurring subsequent to the date of change in the maximum.

could easily find employment as a bus or truck driver. This argument is really a claim for lost earning capacity, not work-loss benefits. Plaintiff is not arguing that he is due benefits for the actual loss of earnings he *would* have received as a city bus driver but for his injury, i.e., accrued wages. Rather, he is arguing that he is due benefits for work he *could* have performed as a bus or truck driver but for the injury. See *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 647; 513 NW2d 799 (1994). The Michigan No Fault Act does not allow compensation for loss of earning capacity. *Ouellette v Kenealy*, 424 Mich 83, 85; 378 NW2d 470 (1985).

In any event, in circumstances like those present, we believe that termination of an employee for failing a drug test is an independent intervening event that severs the chain of causation between plaintiff's accident and his loss of income.[5] No-fault work-loss benefits are intended to compensate an injured person "'by providing protection from economic hardship caused by the loss of the wage earner's income as a result of an automobile accident.'" *Marquis*, *supra* at 644, quoting *Perez v State Farm Mut Auto Ins Co*, 418 Mich 634, 640; 344 NW2d 773 (1984) (Levin, J.). We acknowledge that the case law on the subject of supervening events is restricted to situations where the plaintiff was completely removed from the workforce. See *MacDonald v State Farm Mutual Ins Co*, 419 Mich 146; 350 NW2d 233 (1984); *Luberda v Farm Bureau General Ins Co*, 163 Mich App 457; 415 NW2d 245 (1987). However, we do not believe that such an event is the only type of occurrence that can sever the chain of causation.

In the case before us, defendant provided plaintiff with favored work at plaintiff's pre-injury wage. However, he was terminated from this position because he allegedly failed to pass a required drug test. Plaintiff is not claiming that he could be reinstated as a bus driver for defendant even though he failed this drug test. Rather, plaintiff is arguing that he still would be employed as a bus driver had the accident not happened. This argument ignores the realities of the situation. In essence, plaintiff is asking that we ignore subsequent events—particularly his drug test—and focus solely on where he would have been had this whole chain of events not occurred. Plaintiff's termination from favored work is due to his failed drug test, not his wrist injury. Without this event, plaintiff would have continued the favored work and would not have sustained any loss of income. Stated another way, after plaintiff was terminated for failing the drug test, he would not have earned a wage even if the accident had not occurred.

However, plaintiff also argues that the issue of whether he was fired for just cause should have gone to the jury. We agree. It is clear from the record that plaintiff challenged the validity of the positive drug test. There is no indication that plaintiff waived his right to have the jury decide this issue. MCR 2.509. Accordingly, we remand for further proceedings on the question of whether plaintiff was fired for just cause. If the jury determines that plaintiff was fired for just cause, then his termination for failing the drug test is a supervening event that breaks the chain of causation. If the jury finds that he was not fired for just cause, then the causal chain remains

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[5] Plaintiff argues that "case law is replete with situations in which workers are fired or even voluntarily quit jobs obtained subsequent to their accident yet they are still considered eligible for work loss benefits." However, plaintiff provides no citation to a single case where a worker was subsequently fired from a post-injury job.

unbroken, and plaintiff would be due work-loss benefits dating from the time of his termination, subject to his duty to mitigate. See *Marquis, supra*.

Because it will likely be an issue both on remand below and if the case returns to this Court, we address plaintiff's assertion that he is entitled to twelve percent judgment interest under MCL 600.6013(5). MCL 600.6013(5) provides for twelve percent judgment from the date the complaint was filed to the date that the judgment is satisfied "if a judgment is rendered on a written instrument." Plaintiff argues that the certificate of self-insurance issued by the Secretary of State to defendant constitutes a written instrument upon which judgment interest under subsection 6013(5) may be awarded. We disagree.

Plaintiff notes that, in *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998), our Supreme Court held that an insurance policy is a written instrument. He argues that the certificate of self-insurance is an insurance policy. In *Yaldo*, the plaintiff's claim against the defendant insurer was based on the insurance contract. The plaintiff filed a claim for payment on the policy. The plaintiff prevailed, and the Court determined that the plaintiff was entitled to interest under subsection 6013(5). *Id*. at 343.

In this case, plaintiff's action is to recover under the no-fault act; he does not seek to collect under an insurance policy as a party to that policy. Thus, the award of work-loss benefits to plaintiff under the no-fault act is not a judgment rendered on a written contract, as required under subsection 6013(5). Plaintiff is not entitled to twelve percent judgment interest for a judgment in this case because, if he wins at trial, judgment will not be rendered on a written instrument.

On cross-appeal, defendant argues that the trial court erred in denying its request for mediation sanctions. The trial court denied defendant's request after concluding that the verdict involved a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation and, under the circumstances, it was not in the interests of justice to award defendant sanctions. Defendant argues that the trial court's decision is erroneous. We agree.

At the time of these proceedings, MCR 2.403(O) provided:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.
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> (2) For the purpose of this rule "verdict" includes,
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> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,
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> (c) a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation.

* * *

> (11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.

In denying defendant's motion for mediation sanctions, the trial court reasoned that defendant could have raised its motion in limine regarding the work-loss benefits issue far earlier than it did, thus saving discovery expense on the issue. Because the judgment necessarily incorporated the court's ruling on defendant's motion, the court reasoned, the judgment was the result of a ruling on a motion. The court found that MCR 2.403(O)(11) therefore applied and declined to award actual costs, finding that this was in the interest of justice.

In *Grievance Administrator v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2000), our Supreme Court explained:

> When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. Similarly, common words must be understood to have their everyday, plain meaning. [Citations omitted.]

MCR 2.403(O)(2)(c) defines "verdict" as "a judgment entered *as a result of* a ruling on a motion after rejection of the mediation evaluation." In *Marketos v American Employers Ins* Co, 465 Mich 407, 414; 633 NW2d 371 (2001), our Supreme Court explained that "[f]or purposes of awarding sanctions under MCR 2.403(O), a 'verdict' must represent a finding of the amount that the prevailing party should be awarded." "Judgment" is defined as "[a] court's final determination of the rights and obligations of the parties in a case." *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 220, n 4; 625 NW2d 93 (2000).

MCR 2.403(O)(11) applies where there is a judgment entered as a result of a ruling on a motion after mediation. Here, the "judgment," that is, the final determination of the rights and obligations of the parties, was entered following trial and based on the jury's verdict. The judgment was not the result of the court's ruling on defendant's motion, even though it had an effect on the ultimate verdict. Instead, the verdict was a jury verdict.

Accordingly, we vacate the trial court's decision on defendant's motion for mediation sanctions. However, because the issue of mediation sanctions will be affected by the outcome of the remand proceedings, we hold that defendant is not due such sanctions at this time. That issue will undoubtedly be revisited after the issue of whether plaintiff was fired for just cause is decided.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.